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THE SCOPE OF "RESPONDEAT SUPERIOR" IN CRIMINAL LAW.

In this article I propose to consider how far the maxim "respondeat superior" is applicable to criminal law and to attempt to point out the leading principles which seem to govern the application of the maxim to questions of criminal liability on the part of the master for the acts of his servants. The question as to the master's criminal liability for the acts of his servant has frequently arisen for decision before the courts, but there is hardly any consensus of opinion as to the principles upon which the master's liability rests. Sometimes the liability is attempted to be made conformable to the doctrine of *mens rea* and is put upon the ground that the master must be taken to have impliedly authorised the act in question. Sometimes it is said that public interests require the imposition of such a liability; while in other cases the difficulty of finding out the actual perpetrator of the crime, the comparative ease with which the master can be brought to justice in case he is made liable and the facility with which the law could otherwise be evaded if the master were left free, are among the reasons alleged for justifying the master's criminal liability.

Literally the maxim means "let the superior answer" "let the superior be held answerable." In its Latin garb, the maxim appears to have been long known to the English law. In *Hall* v. *Smith* 2 Bing., 160, Lord Wynford says "This maxim was first applied to public officers by the Stat. Westm. 2, c. 11, from the words of which statute it is taken." The doctrine of 'respondeat superior' is of very wide application in civil law. It is settled law that whether the act of the servant be one of commission or omis-

sion, whether it is negligent, fraudulent or deceitful or even is an act of positive malfeasance or misconduct, still if. the act is done in the course of the employment, the master is responsible civilly to third parties.' And the master is equally liable in civil law for the act of the servant done in the course of the employment even though the act may have been done contrary to the express orders of the master. In the recent case of *Dyer* v. *Munday* [1895,] I Q.B., 742, the master's civil liability was held by the Court of Appeal to apply even with respect to the criminal acts of servants done within the scope of their employment. It is also settled law that a master is not liable even civilly for the acts of his servant if done outside the scope of his employment.

It is thus clear that the real test in applying the doctrine of 'respondeat superior' to civil law is whether the act done does, or does not, lie within the scope of the servant's employment. But can this same test serve to determine questions of the master's criminal liability for the acts of his servants? So far as an act is beyond the scope of the employment, it has been decided over and over again that there is no criminal liability at all on the part of the master See *Harrison* v. *Leaper* 5 L. T., 640; *Newman* v. *Jones* 17 Q. B. D., 132. But is the fact that an act is within the scope of the servant's employment, alone sufficient to fix the master with liability in criminal law as in civil law?

It is perhaps necessary to observe that cases of abetment at or before the commission of the offence and cases of being accessories after the fact do not fall witthin the scope of the present article. In these cases the abettor or accessory is responsible by reason of his own personal act done either in anticipation, furtherance or concealment, of the offence The liability in these cases will remain the same whether the person abetted or aided is or is not the servant of the abettor and is quite independent of the relation of master and servant. The cases we have in view are cases in which the master is as such, without *more*, liable for the acts of his servant.

The tendency at present is against any undue extension of this principle. In *Collett* v. *Foster* (28 L. J. Exc, 612) *Bramwell B*, expressed a great desire to limit the doctrine of 'respondeat superior.' so as to make the actual wrong-doer alone responsible.

In *Smith* v. *Keel*, L. R., 9 Q. B. D., 340, *Jessel, M. R.*, observed "I agree that the court ought to be very careful how it extends the doctrine 'respondeat superior.' It has been carried in our law very far indeed."

Generally speaking the doctrine of "respondeat superior" relates to civil liability and not, except in some instances, to criminal liability. Its extension to criminal law is hardly consistent with some of the fundamental principles of that law. Austin says that intention, negligence, heedlessness or rashness is of the essence of guilt and that action, forbearance, or omission is as necessary an ingredient in the notion of guilt as the blameworthy condition of mind with which the action, forbearance or omission is connected. In every offence there must be in addition to an act of omission or commission a blameworthy condition of mind; there must be what is generally described by the term '*mens rea*'. According to this doctrine of '*mens rea*' the offender must be shown to have acted with a consciousness of doing wrong; 'there must be a mind at fault before there can be a crime.' There must be not merely a consciousness of the act but a consciousness that the act is a wrongful act. Wherever there was consciousness in fact on the part of the accused, we can, with the aid of the principle that every one is presumed to know the law, hold in the majority of cases that the offender had also a guilty consciousness at the time of the offence. Thus where the act is done personally by the master himself, or with his personal participation, or where the act is specifically ordered to be done, we can affirm the existence of '*mens rea*' on the part of the master, in most cases as a matter of fact, and in some cases as a matter of logical implication.

But in all those cases where we cannot predicate any knowledge on the part of the master either at the time the act was done by the servant or even previously to the act, that it was going to be done, we cannot with any show of reason infer any guilty consciousness, any *mens rea* on the master's part. The condition of the mind of the servant cannot be imputed to an innocent master who perhaps never had the act in question in his mind. Hence it is laid down as a general rule of law that a master is not criminally responsible for the acts of his servants. See Smith's Law of Master and Servant 4th ed., page 306; *Chisholm* v. *Doulton* 22 Q. B. D., 760; *Budd* v. *Lucas*, L. R. [1891] 1 Q. B., 408.

In *Chisholm* v. *Doulton*, 22 Q. B.D., 780; Mr. Justice Cave after referring to the doctrine that a man cannot be convicted of an offence unless he had a criminal mind, observes: "Moreover it is a principle of our criminal law that the condition of the mind of the servant cannot be imputed to the master. A master is not criminally responsible for a death caused by a servant's negligence and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to be stolen. And this principle of the common law applies also to statutory offences with this difference that it is in the power of the legislature, if it so pleases, to enact and in some cases it has enacted, that a man may be convicted and punished for an offence, although there was no blameworthy condition of mind" but the presumption is always against such enactment "for we ought not to lightly presume that the legislature intended that A should be punished for the fault of B."

It follows from what has been said above that the extension "of respondeat superior" to criminal law will militate against the doctrine of *mens rea* which ordinarily obtains in the sphere of criminal law. And it is only in those cases which are expressly declared not to fall within the doctrine of *mens rea,* we can with any degree of consistency expect to apply the maxim of 'respondeat superior. But the principle of *mens rea* has had such a strong hold upon the minds of some Judges, that we see them sometimes explain the maxim in such a way as not to bring it in conflict with the doctrine of *mens rea.* They seek to ultimately base the criminal liability of the master upon the theory of implied command of the particular act in question. If the act complained of can be held to have been impliedly commanded by the master, then we can certainly assert the existence of *mens rea* on the part of the master.

But does the maxim of 'respondeat superior' rest upon any such theory of implied authorization of the particular act? It does not, even with respect to cases of civil liability. In the words of *Lush J.* in *Reg* v. *Holbrook* 4 Q. B. D., 51 1878, it is "on grounds of public policy and general convenience" that the maxim "puts the master in the same position *as if* he had done the wrong himself." Civilization, progress in the various arts and industries, extension

of commerce and the widening of intercourse between different and distant parts of the world will render it physically impossible for a person personally to transact business himself. The law of agency is but the result of a highly organised state of society and the development in that law is typical of the march of civilization and the advance of thought. To subject the master to civil liability for the acts of his servants will not in any way impede the conduct of business, but, on the other hand the recognition of such liability is necessary in the interests of the public. In *Hall* v. *Smith* 2 B, 160, *Lord Wynford* explained the master's liability in these terms, "The maxim is bottomed upon this principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it" This expectation of a pecuniary benefit may be a sufficient justification for inflicting a merely pecuniary or civil liability upon the master but can hardly justify the infliction of criminal liability consistently with the doctrine of *mens rea*'. As already shown, it cannot be said that with respect to the acts of a servant there is any *mens rea* on the part of the master. The theory of implied command has been rejected as unsound in several cases. Thus in *Cooper* v. *Slade* 6 H. L. 793, *Lord Wensleydale* in delivering judgment said "I take it to be a clear proposition of law that if a man employs an agent for a perfectly legal purpose and that agent does an illegal act, that act does not affect the principal unless a great deal more is shewn . . . . I conceive that the rule of law is, as I have said it down, that no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has in some way directly or indirectly authorised it as I have explained." In *Reg* v. *Holbrook* already cited, Mr. Justice Lush observes: "And I think the jury ought to be told in this as in every other case that criminal intention is not to be presumed but is to be proved and that in the absence of evidence to the contrary a person who employs another to do a lawful act is to be taken to authorise him to do it in a lawful manner and not in an unlawful manner. This is the doctrine which is applied to other cases of wrongs done by servants when it is sought to fix with criminal liability the employer." In the same case, Chief Justice Cockburn observes at page 59: "But surely the prohibition not to violate the law is impliedly involved

in every service in which an agent is employed and in which the law may possibly be broken by such agent. I take the case of an agent employed to buy goods on which a duty is payable and who to benefit his employer buys smuggled goods unknown to the employer. The agent would be criminally liable; the employer would not." Thus an examination of the authorities fortifies us in our position. The true basis of the principle of *respondeat superior* does not harmonise with the doctrine of *mens rea* so as to enable us to impute to the master a *mens rea* where-ever there is *mens rea* on the part of the servant. With respect to the acts of the servant the master cannot be charged with any blameworthy condition of mind unless the master has either expressly or by necessary implication ordered the act in question, or been privy, or in any way assented, to its commission. Such implication will generally not arise as "the prohibition not to violate the law is impliedly involved in every service" but such implication will be taken to arise in all those cases where a servant is so employed by his master that an offence would be a necessary or probable consequence of such employment. Thus as the court of Queen's Bench observed in *Wilson* v. *Sankin* 6 B & S. 216, the case of a bookseller whose shopman sells a libellous publication will be a case in which the master will be criminally liable by reason of this necessary implication of authority.

If then it is only those cases which are taken out of the purview of the principle of *mens rea* that fall under the operation of 'respondeat superior' we may ask whether the doctrine of *mens rea* admits of any infringement. In a recent Full Bench case (*Reg* v. *Fischer,* 15 M, 342) the Madras High Court had to consider the scope of this principle and held that, generally speaking, an innocent state of mind directly arising from ignorance of law cannot avail the accused. Mr. *Justice Muthusamy Aiyar* said, "It is true that there must be 'a mind at fault before there can be *a crime.*' But in applying this principle it must be remembered that every man is presumed to know the statute law of the country and construe it aright; if any individual should infringe it through carelessness or ignorance he must abide by the consequences of his error; that it is not competent to him to answer in a court of justice that he was ignorant of the law of the land and that no court of justice is at liberty to receive such a plea."

A plea of want of *mens rea* must be based not upon ignorance of law but upon something else consistently with a knowledge of law. In other words in all those cases to which the doctrine of *mens rea* applies, it is only an innocent condition of mind arising from causes other than ignorance of law that can be entertained as a valid plea. And there are cases in which even such a plea has been held to be invalid—cases in which the doctrine of *mens rea* is departed from and convictions have been considered to be compatible with such an innocent state of mind on the part of the accused. In *Chisholm* v. *Doulton* 22 Q. B. D., 760 already cited, *Mr. Justice Field* says that " the legislature undoubtedly may enact that persons shall be criminally liable for the doing of particular acts even though they have no guilty mind in doing them." In this case we have already seen that *Mr. Justice Cave* remarks that " it is in the power of the Legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be punished for an offence although there was no blameworthy condition of mind." In *Cundy* v. *Le Cocq* 13 Q. B D., 207, where the court held under some Act that a publican who sold liquor to a drunken person was guilty of an offence although he, the seller, was innocent and had no knowledge of the drunken condition of the person served with liquor, Mr. *Justice Stephen* speaking of this maxim that in every criminal offence there must be a guilty mind, expressed himself thus ; " I do not think that that maxim has so wide an application as it is sometimes considered to have. In old times and as applicable to common law or the earlier statutes, the maxim may have a general application, but a difference has arisen owing to the greater precision of modern statutes " See also the cases of *Reg* v. *Prince* (L. R. 2 C. C. R, 154) and *Reg* v. *Bishop* (5 Q. B. D., 259.)

What then is the nature of those cases to which the doctrine of *mens rea* has been rendered inapplicable and which therefore readily lend themselves to be governed by the maxim of 'respondeat superior" ? and what are the reasons upon which such exceptional cases stand ? The relaxation of the '*mens rea*' doctrine and the introduction of what may be described as the doctrine of vicarious conviction are occasioned by various considerations. In *Attorney-General* v. *Allen*, Exc. Mich Term 1850 *Baron Pollock* observed with respect to offences under the revenue laws that if a master were not held responsible for the acts of his servants, the revenue laws would be evaded with the utmost facility and impunity and

that they would be reduced to a mere dead-letter. In *Attorney-General* v. *Siddon* 1 Cr & J 226, 1 Tyr. 41, where the master was held liable for the servant's acts of harbouring and concealing tobacco without paying duty, although at the time of detection the master was absent from home and had been absent for sometime previously, *Baron Bailey* said "This is a case certainly of a different description and I agree with the distinction that was taken when it was argued that this does not fall within the ordinary range of the cases of a servant's act *being* the master's act. . . . . . This is a case in which to my mind the act of the servant is *to be considered as being* an act done in the masters's business. . . . ." Other illustrations of the master's liability for offences under the revenue laws committed by their servants are furnished by the cases of *Rex* v. *Dixon*, 4 C, 12 *Rex* v. *Dean*, 12 M & W. 39 ; *Davies* v. *Harvey*, 43 L. J. M. C. 121.

Again in the case of some public nuisances, the doctrine of *mens rea* has been infringed so as to admit of the operation of the maxim of "respondeat superior". Speaking of public nuisances such as carrying on offensive trades, *Smith* says "In such cases if a master could shield himself from criminal responsibility on the ground that he personally had nothing to do with the carrying on of the trade, the real offender might escape with impunity and the public grievance remain unredressed." In *Reg* v. *Great North of England Railway Company*, 9 Q. B., 315, where a Railway Company was held liable to an indictment for a nuisance caused by the misfeasance of their servants, *Lord Denman* speaking of the actual offenders said : "But the public knows nothing of the former, and the latter if they can be identified are commonly persons of the lowest rank wholly incompetent to make any reparation for the injury. There can be no effectual means. . . . except that remedy by indictment against those who truly commit it, that is, the corporation acting by its majority ; and there is no principle which places them beyond the reach of the law for such proceeding" In *Turberville* v. *Stampe, Lord Raym* 264, Chief Justice Holt said "if my servant throws dirt in the highway, I am indictable."

Other instances of the master's liability for the nuisances caused by his servants although the master was perfectly *innocent* of the acts complained of are afforded by the following cases : *R.* v. *Medley* (16 C & P. 222) where the directors of a gas company were held liable for nuisances caused by their workmen ; *R.* v. *Stephens*

(L. R. 1 Q. B., 702) where a master was held liable to an indictment for obstructing a river, although he specially ordered his servants not to do it. In *R.* v. *Medley, Denman C. J.*, observed at p. 299 of the report, "It seems to me both common sense and law that if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by their servants." In *Rex* v. *Dixon* & S. 11, 14 Mr. Justice Bayley expressed himself thus: "B Again with respect to offences done with reference to things which are transient and fleeting such as a vessel, it is enacted in many cases that the owner or person in charge of the thing shall be responsible for the offences committed by others". Thus in *Chisholm* v. *Doulton* (22 Q. B. D., 736 1889) already referred to, Mr. Justice Field by way of illustrating the difference between cases of offences where *mens rea* is essential and cases of offences where the legislature has chosen to dispense with the doctrine of *mens rea*, compares S. 1 with S. 2 of the Metropolitan Smoke Nuisance Act of 1853 (16 and 17 Vict C, 128): "S. 1 applies to a stationary thing, a furnace fixed in a building and provides that the person to be punished shall be 'the person so offending' the person, that is to say, who negligently uses the furnace; whereas S. 2 applies to a thing which is transient, a steamer moving up or down the river and provides that the person to be punished shall be not the "person so offending but the 'owner or master or other person having charge of such vessel. From a comparison of the language of those two sections, it seems to me that the intention of the legislature was in the one case to strike at the person guilty of the negligence, while in the other owing to the difficulty of finding out who that person was, it struck directly at the owner or person in charge." In this case, the owner and occupier of certain pottery works in the metropolis was charged under S. 1. The master was held not liable "as the essence of the offence was negligence and the respondent (master) took all the care he could."

In *Redgate* v. *Haynes* 1 Q. B. D., 89 a case under the Licensing Act of 1872, it was held that if the servant of a hotel-keeper being left in charge of the hotel suffers gaming upon the premises, his master is liable to a conviction. *Blackburn J,'* said "I think that where the landlady goes to bed, she is still answerable for the conduct of those whom she leaves in charge of the house and if those persons connive at the gaming, she is responsible. Other

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instances of vicarious punishments being legalised by special enactments are to be met with, among others, with reference to the Licensing Act of 1872 (35 and 36 Vict C, 94)—(*Mullins* v. *Collins* L.R., 9 Q. B 292) the Truck Act—(*Smith* v. *Walton*, 3 C. P. D., 109, where the servant paid wages otherwise than in the current coin of the realm) the Pawnbrokers Act 1872 (35 and 35 Vict C, 93 S. 8) and other special statutes.

All the reasons which we have found to have been stated by judges in support of this vicarious liability in special cases, might be really resolved into this one reason, namely, the effective repression of those special offences. In these cases the substitution or addition of vicarious punishment is considered to be the only remedy most conducive to the suppression of crime. It must here be observed that in all these cases we find a duty imposed by special law upon the master, the bare neglect of which entails criminal responsibility upon the master. And we maintain that in spite of this specific creation of duty, there is in all these cases no *mens rea* on the part of the master.

Bishop, the American jurist thus explains the ultimate principle upon which these cases of vicarious criminal liability may be taken to depend. He says "There are circumstances in which a master will be held liable criminally for his servant's act or his own in respect to the servant" and quotes in support of this statement, the observations of *Justice Bayley* in Rex v. *Dixon*, 3 M & S. 11 at p. 14, "If a person employs a servant to use alum or any other ingredient the unrestrained use of which is noxious and do not restrain him in the use of it, such person is answerable, if the servant uses it to excess, because he did not apply the proper precaution against its mis-use." Bishop's Criminal law S. 316, p. 202. Again in S. 317 *Bishop* writes "In these cases and some others of a like sort brought to view in a previous conviction, the law casts upon the master a duty of care in the employment of his servants and a constant supervision. The real thing punishable therefore is his own carelessness. But where this element does not aid the prosecution, the rule is clearly established that in criminal law, the principal is not answerable as he is in civil jurisprudence for the act of his servant or agent."

Now it is hardly necessary to state that the so called careless-

ness on the part of the master is nothing positive, directly relating to the offence committed, but a carelessness in omitting to see that his servant does not commit any offence. The master is punished not for his carelessness itself though that alone is really punishable, but the master is punished for the act of another independent agent. The master though only guilty of a breach of police vigilance, so to speak, which the law requires the master to exercise over his servant, is really punished not for his want of vigilance but for the offence of another, which the master has not prevented from being perpetrated. There is no *mens rea* on the part of the master, with respect to the acts of the servant; and the law by making the master responsible for the crime that his servant may commit, does virtually make it the interest of the master to aid in the prevention of these special crimes. It is submitted that even the most searching analysis, even the highest generalization, of the principles underlying these cases of vicarious criminality cannot enable us to assimilate these cases with the doctrine of *mens rea.* "In order to make a person criminally responsible for negligence, the act complained of must appear to be his *own personal* negelect or default." It is necessary that the carelessness is such as does cause, or is likely to cause injury." Mayne's Penal Code 13th Ed. 237. To sustain a case of criminal liability as against the master the acts complained of must be traceable to the master's own personal neglect.

It logically follows from what has been said above that "as the liability of a master to answer criminally for the acts of his servants presupposes and is in fact founded upon the violation of some public duty legally binding upon the master, it can of course only exist where such duty exists and must cease where such duty ceases to be binding; Smith's Law of Master and Servant 4th ed. 321. Thus in *Brown* v. *Mullet* 5 C. B., 599, where a vessel was sunk by accident in a navigable river and without any default on the part of the owner or his servants, it was held that no liability civil or criminal was incurred, as the law does not ordinarily cast under such circumstances the duty of using any precaution to prevent other vessels from striking against it.

We will now pass on to notice a few Indian decisions that bear upon the points under discussion. In *Larrymore* v. *Pernandoo*

Deo Rai 14 W. R., (Crl Rgs) 32, the court in recognition of the general rule that a master as such is not liable for the criminal acts of his servants even though done within the scope of his employment, ruled that the actual driver and not the owner of a carriage is liable under S. 279 of the Indian Penal Code in the matter of a collision and injury to another arising out of rash driving. The same general principle was expressly laid down in the cases of *Suffer Ali Khan* v. *Golam Hyder Khan,* 6 W. R., Crt. Co.; *Queen* v. *Sham Sunder* 1 N. W. H. R. 310.

In *Queen Empress* v. *Krishnayyen,* 15 M 156, which was a case under S. 21 (d) of the Madras Forest Act V of 1882, it was held that the owner of cattle found grazing in a forest reserve cannot be held criminally liable in the absence of evidence to show "that defendant pastured the cattle or permitted them to trespass in the reserved forest." The court said that "such cattle may be impounded, but the owner cannot be held liable, unless some overt act of his be proved."

In *Chunder Churn Mookerjee* v. *Empress,* 12 C. L. R., 508; 9 C, 849; the court has clearly laid down the principles governing these cases. In this case, the question as to the criminal liability of the master for the acts of his servant arose in connection with S. 22 of the Indian Ports Act 12 of 1875. The High Court laid down the law to be that a master is *not* criminally liable for the acts of his servants *unless specifically declared by statute.* "If the Legislature had intended to make persons in the appellant's position criminally liable for acts done by persons employed by them without proof of connivance, it would surely have been provided for in the Act. Section 22 and following sections enact that the master of any vessel shall be liable to be punished for acts done on board in breach of the rules laid down, though they possibly be done without his knowledge or even against his orders. This express creation of criminal liability as against the master shows that without it, he would not be liable for an act done, or expressly permitted, by himself."

With reference to S. 283 of the Indian Penal Code Mayne discusses the question of the master's liability for the wrongful acts of his servant. Mayne remarks "Although the possession of the servant or agent will be the possession of the master, the acts

or omissions must be the personal acts or omissions of the occupant himself" and then invokes in support of this view the authority of the ruling in a case referred to in 1 Russell 831. In that case, Mr. Justice Parke said "In a criminal case every man is responsible for his own act; there must be some personal act." Again in connection with another class of cases falling under S. 283 Mayne says that masters could not be indicted "for injuries arising from the wrongful omissions of their servants unless traceable to their own personal neglect."

But there are cases in which a person is held criminally liable for nuisances caused by others, in connection with his property, even though the owner is personally innocent and even though there is no *mens rea* on the part of the master. In these cases, a person merely because he is in the position of *occupier* is specifically rendered by law criminally liable. The criminal liability is made an incident to the holding of property. Thus in *R.* v. *Watts* 11 *Salk*, 357, the court observed "It is not only charged but found that the defendant was *occupier* and in that respect he is answerable to the public; for the house was a nuisance as it stood and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier and not to the estate which is not material in such a case to the public." And Mayne says that cases like the above will in India fall under S. 213 of the Indian Penal Code 8. We may also refer to Ss. 154, 155 and 156 for instances in which the Statute law imposes criminal liability on the master for the act or omission of the Agent.

As affording additional instances of vicarious criminal liability created by special acts we may refer to S. 222 of the Madras District Municipalities Act 4 of 1884 and to S. 64 of the Madras Abkari Act 1 of 1886.

It appears from the language of S. 222 of the Municipal Act that a master may be held liable for nuisance committed by his servant. Again with respect to offences falling under Ss. 55, 56, 57 and 58 of the Madras Abkari Act, the latter part of S. 64 expressly enacts "And the holder of a license or permit under this Act shall be punishable as well as the actual offender . . . . as if he had himself committed the same unless he shall establish that

all due and reasonable percautions were exercised by him to prevent the commission of such offence.

M. K. VYTHINATHA IYAR.

REVISION IN SMALL CAUSES.
ACT IX OF 1887, S. 25.

In construing S. 25 of Act IX of 1887, the Allahabad High Court has laid down, in some recent cases, that its scope must be taken to be co-extensive with that of S. 622 of the Code of Civil Procedure, and that the exercise of the Court's revisional powers under the former should be regulated by the same considerations which would support its similar jurisdiction under the latter, *viz.*, exercise, by the court by which the case was decided, of a jurisdiction not vested in it by law, or failure to exercise a jurisdiction so vested, or acting in the exercise of its jurisdiction illegally or with material irregularity. This construction owes its parentage to *Raghu Nath Sahai* v. *The Official Liquidator of the Himalaya Bank Ld.*, 1893, I. L. R., 15 A, 139. The allegation made by the defendant-petitioner was that the suit was time-barred, and that the Small Cause Court had come to an erroneous decision upon the point. *Burkitt, J.* held that an application under S. 25 ought not to be entertained except in cases where a similar application under S. 622 of the Code would be allowed; and, as an application under S. 622, founded only on a question of limitation, could not be entertained, according to the principle of the Privy Council decision of *Amir Hassan Khan* v. *Sheo Baksh Singh*, I. L. R., 11 C. 6, neither could a petition under S. 25 be based upon the same ground.

The question whether the High Court would exercise its revisional jurisdiction upon the ground of limitation arose again in *Gauri Datt* v. *Parsotam Das*, 1893, I. L. R., 15 A., 373, where a petition under S. 25 was made to *Straight, J.* for that purpose. *Straight, J.* seems to have rejected the application, though the ground of the rejection does not appear from the report. The question came up once more in *Sarman Lal* v. *Khuban*, 1894, I. L. R., 16 A., 476. The plaintiff sued the defendant in a Court of Small Causes for the recovery of money lent upon a mortgage. That Court dismissed the suit as barred by limitation; whereupon the plaintiff applied to the High Court for revision of its judgment

under S. 25. The question was referred to a Full Bench which held that S. 25 was not in effect intended to give, what would practically be, an appeal in every case from the decision of a Court of Small Causes, but that the High Court's discretion to be exercised thereunder should be guided by the same considerations as those which govern the application of S. 622 of Act. XIV. of 1882. It was said in this case at p. 477 " S. 25 is not intended by the Legislature to be applied except in those cases to which S. 622 of Act. XIV. of 1882, was considered to be applicable before the decision of the Privy Council in *Amir Hassan Khan* v. *Sheo Baksh Singh* ", From this sentence it would appear that the Full Bench did not intend the construction of S. 622 *as restricted by the Privy Council*, but the *former* view of S. 622, to be the rule of construction of S. 25. But, in the first place, this qualification does not appear in the earlier passages of their judgment, which seem to convey the meaning that S. 622, as *at present* construed, viz., at the time of the decision in this case and after the Privy Council ruling is to give the rule for S. 25. And secondly, as stated by the Divisional Court upon a return of the reference from the Full Bench, there was no consistent course of decisions in that Court upon the point. As a matter of fact the Divisional Court rejected the petition for revision upon the narrower interpretation of S. 622 placed on the section by *Amir Hassan Khan* v. *Sheo Baksh Singh*, which it regarded as the correct view, and accordingly held that it was no ground for revision under S. 25 that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. See *Sarman Lal* v. *Khuban* 1894, I. L. R. 17 A, 422.

Prior to the adoption of this view of S. 25, a somewhat wider intrepretation was given to the Section by the Allahabad High Court in the earlier cases. The earlier interpretation appears to have been of a transitional character, and to have foreshadowed the construction laid down in the above rulings. There is no indication from the Reports as to what was the principle upon which the Court exercised its revisional jurisdiction under S. 25 between 1887 and 1890. But in 1890 *Mahmood J.* ruled in *Muhammad Nizamuddin Khan* v. *Hira Lall* W. N. (1890) 121, and *Masum Ali* v. *Mohsin Ali*, W. N. (1890) 201, that S. 25 was not intended to give in effect a right of appeal in all Small Cause Court cases,

These two cases were approved of and followed in *Muhammad Bakar* v. *Bahal Singh*, 1890, I. L. R., 13 A, 277. The defendant in this case pleaded before the Small Cause Court, (i) that the instrument sued on was not a promissory note but an agreement and that hence, no cause of action had accrued to the plaintiff, (ii) that no notice as required by law had been issued to him, and (iii) that the plaintiff could not derive any benefit contrary to the terms of the instrument. The Court having decided in favor of the plaintiff, the defendant applied to the High Court for revision on the grounds (i) that the Judge was wrong in holding that the condition about the time of payment was void under S. 29 of Act IX of 1872, (ii) that the document sued on was insufficiently stamped, and therefore inadmissible in evidence and (iii) that the suit was premature. The principle upon which revision under S. 25 should be entertained was thus laid down by the Full Bench: "We think we should not interfere under S. 25 unless it clearly appeared to us that some substantive injustice to a party to the litigation has directly resulted from a material misapprehension or misapplication of law or from a material error in procedure." The test of the applicability of S. 25, according to this ruling, is *substantial injustice* arising from *material* error of law or procedure *i.e.*, injustice upon the merits of a case and error of law or procedure causing such injustice. This principle is not necessarily co-extensive with that of S. 622 as interpreted in the Privy Council case and adopted in the later Allahabad rulings under S. 25. Although this case was referred to in *Raghu Nath Sahai* v. *The Official Liquidator* and *Sarman Lal* v. *Khuban*, its *ratio decidendi* does not appear to be identical with that of the two other cases. In the last case substantial injustice would have been done to the plaintiff, if the decree of the Small Cause Court was wrong: and the facts would have brought the case within the principle of *Mahammad Bakar* v. *Bahal Singh* I. L. R., 13 A, 277. The decision of *Mahmood J.* in *Malik Rahmat* v. *Shiva Prasad*, 1891, I. L. R., 13 A, 533 lays down no specific test. An application for revision under both S. 25 of Act IX of 1887 and S. 622 of the Code was entertained, and the decree and imperfect judgment of the Small Cause Court was set aside. It may be explained on the grounds of substantial justice upon the merits of the case (as the Judge of the Court below did not appear to have understood the case at all, or the

facts which would have a bearing upon the right decision of the case), and of exercise of jurisdiction illegally or with material irregularity as enacted in S. 622 of the code.

It is said in these cases that the discretion of the High Court to entertain an application for revision, under S. 25 of Act. IX of 1837, is *purely* discretionary (*Muhammad Nizamuddin Khan* v. *Hari Lall*: *Masum Ali* v. *Mohsin-Ali*: *Raghu Nath Sahai* v. *Official Liquidator*: *Gauri Datt* v. *Parsotam Dass*: *Sarman Lal* v. *Khuban*), that it was not intended to create in effect an appeal on a point of law or fact in every case from the decision of a Small Cause Court which is final (*vide* cases *supra*), but that the proper rule for the guidance of the exercise of its discretionary powers of revision, under S. 25, is the avoidance of substantial injustice resulting from material misapprehension of law or procedure, (*Muhammad Nizamuddin Khan* v. *Hira Lall*: *Mosum Ali* v. *Mohsin Ali*: *Muhammad Bakur* v. *Bahalsingh*), or the existence of the grounds specified in S. 622 of the Code (*Raghunath Sahai* v. *Official Liquidator*: *Sarman Lal* v. *Khuban*).

Section 25 does indeed confer a discretion upon the Court, but it is a *judicial* discretion; and if it has been made out *prima facie* "that a decree or order, made in any case decided by a Court of Small Causes, was *not* according to law," whatever may be the true meaning of the words, the Court should interfere, uninfluenced by the fact of finality of the decree or order under S. 27 of act IX of 1887, which is itself subject to S. 25. The words "in any case" also appear to favour this view. The limited construction placed on S. 25, in these cases, appears to be founded on the argument that it was not intended to give in effect an appeal in every case on law or fact, having regard to the finality attached to Small Cause Court decisions by S. 27. The answer to this is not far to seek. The policy of the creation of Small Cause Courts is cheap and speedy justice in small suits, and S. 27 carries out the object, in part, by enacting finality of judgment. But this policy by no means requires finality at the expense of bad law. The convenience and expediency of finality is subordinate to that of due observance and execution of the law in all cases. The policy aimed at is amply carried out by precluding reconsideration of matters of

fact. The object of Ss. 27 and 25 is to prohibit *appeals* which would re-open questions of fact, but to allow *revision* whenever the decree or order of the Court is not "*according to law,*" in order to correct errors of law committed by the lower Court. If S. 25 permits revision *in every case* (and the words "made in *any* case decided by a Court of Small Causes" clearly show this) where the decree is not "according to law," it is no objection that it creates in effect an appeal on law in every case; for it is the very nature of a revision on law to be "in effect an appeal on law." The argument then that the finality of judgment under S. 27 prevents what would in effect be an appeal on law in every case is supported neither by the policy of the law nor by the language of Ss. 25 and 27.

There is no doubt that the guiding principle in the exercise of the court's discretion in revision depends on the proper interpretation of the words "*according to law*", in S. 25. The Allahabad High Court has construed these words with reference to a supposed effect of S. 27, which, as has been said above, and it is respectfully submitted, is unwarranted. The construction that S. 25 applies only in the case of substantial injustice resulting from material misapprehension of law or material error in procedure imposes a limitation on the scope of the section not borne out by its language. In the first place it implies that if no substantial injustice arises, the court ought not to revise the proceedings of the Small Cause Court, although it may be erroneous in law. The words "made in *any* case decided by a Court of Small Causes" are opposed to any such limitation. Then this construction requires "material misapprehension of law or material error in procedure" as another condition precedent to the exercise of revisional jurisdiction. But the section says nothing about "*material*" errors of law or procedure. The words "according to law" have a more extensive meaning, and include errors of law or procedure other than "*material*" errors. Finally, it is not essential to the policy of the law in the creation of Small Cause Courts that only "*material*" errors of law or procedure leading to "*substantial injustice*" should be liable to correction in revision. Every person has a right to require that his case is decided "according to law", whether "substantial injustice" results or not; and where no appeals lie, the necessity of revision upon law in every case becomes stronger.

The construction which identifies the scope of S. 25 with that of S. 622 of the Code is open to still greater objections. (1) In restricting the power of revision to a certain number of cases only, (*viz.*, where the facts mentioned in S. 622 exist), it runs counter to the words "made in *any* case decided by a Court of Small Causes." (2) By no reasonable intendment can the words "*according to law*" be taken as equivalent to, or identical with, the words of S. 622. The words "*according to law*" are more comprehensive than the terms of S. 622. Exercise by a court of jurisdiction not vested in it, or failure to exercise a jurisdiction vested in it, or exercise of jurisdiction, *illegally or with material irregularity* (in the sense of *Amir Hassan Khan* v. *Sheo Baksh Singh*), are only *particular instances* of courts not acting "*according to law.*" (3) The co-existence of revisional jurisdiction under two different Acts, in different language, proves that the two Acts were not intended to be identical in scope. When the Small Cause Courts Act of 1887 was framed, the Legislature was aware that the High Court already possessed jurisdiction in revision with respect to Small Cause Courts, in certain cases, under S. 622 of the Code. If it had intended the Court to possess the same extent of revisional jurisdiction as under S. 622, it would have omitted S. 25 from the Act, or at least worded it so as to correspond with the section of the Code. But the very fact of enacting in addition another section conferring revisional jurisdiction and in terms quite different shows the intention of creating a revisional jurisdiction different in extent. (4) That this was the real reason of enacting S. 25, Act IX of 1887 is perfectly clear from the speech of the Legal Member moving that the Bill, as amended, be passed (*Vide* Abstract of Proceedings of the Governor-General, Vol. 26, p. 34). *Mr. Scoble* stated that it was owing to the restricted construction placed on S. 622 of the Code by a Privy Council decision, which left it competent to inferior courts to commit manifest mistakes of law without the possibility of such mistakes being corrected by a higher tribunal, that S. 25 was inserted, so as to enable the Court to correct mistakes of law which did not fall within S. 622.

The Allahabad High Court has placed upon S. 25, it is submitted with every respect, not only a restriction not warranted by the terms of the section, but the very restriction which it was

intended to guard against by its enactment. The true interpretation of that section, having regard to the true policy of the institution of Small Cause Courts, and of S. 27 in connection therewith, to the clear language employed, to the marked variation from the wording of S. 622 and to the history of its enactment, is that it is applicable in every case where the decree or order of the Small Cause Court is founded upon an erroneous view of the law, or in the words of the Act, is not *"according to law."* S. 25 is wider than S. 622, and applies where the latter fails to operate. If a Small Cause Court has exercised a jurisdiction not vested in it, or failed to exercise a jurisdiction so vested, or has acted in the exercise of jurisdiction illegally or with material irregularity, its proceedings may be revised either under S. 622 of Code or under S. 25 of the Act. If it has decided a point of law wrongly, under circumstances that preclude the application of S. 622, the High Court may revise its decree or order under S. 25. According to this view the High Court had power to revise the proceedings of the lower court in *Muhammad Bakar* v. *Bahal Singh* upon the grounds stated in the petitioner's application, which were questions of law. So also, the alleged erroneous decisions on limitation, in respect of which revision was sought in *Raghu Nath Sahai* v. *Official Liquidator*, *Gauri Datt* v. *Parsotam Das*, *Sarman Lal* v. *Khuban*, formed sufficient ground for the application of S. 25 of Act 9 of 1887.

The High Courts of the other Provinces do not appear from the Reports to have laid down any specific principle of construction of S. 25; but the grounds upon which they have exercised their jurisdiction under it, in the particular cases, are opposed to the Allahabad view of the section. The other High Court have in numerous cases interferred under S. 25 upon petitions based on an error of law.

E. H. MONNIER.

NOTES OF INDIAN CASES.

Unni *v.* **Nagammal**, I. L. R., 18 M. 368. This is another instance of a head-note which does not correctly represent the decision of the Court. The learned judges concurred in the result in dismissing the appeal, but the grounds of their decision were dfferent. *Subrahmania Iyer J.* held that no charge was created for the arrears of rent included in the *rajinamah* as the document only provided that the amount thereof should be paid before redemption of the mortgage. *Best J.* was of opinion that there was no charge as the *rajinamah* was not registered: The reporter however notes the judgment of *Subrahmania Iyer J.* as *queer*.

It seems to us that the view of *Subrahmania Iyer J.* is not altogether free from doubt. A charge as distinguished from a hypothecation does not involve a transfer of an interest. If a vender's lien for unpaid purchase-money is a charge under the Act, it does not seem to be a stretch of the law to hold that a promise to pay an unsecured debt before payment of the mortgage-debt is likewise a charge.

Ramanuja Ayyangar *v.* **Narayan Ayyangar**, I. L. R., 18 M. 374. It cannot be said that because a person purchases property which is involved in litigation for a tenth part of its value it is a champertous transaction. The Privy Council have from the time of the decision in *Fisher* v. *Kamala Naidu*, 8 M. I. A. 170 declined to extend the technical law of champerty and maintenance to India. But a rule of equity and good conscience has been administered which avoids unconscionable bargains at the instance of the person who has suffered disadvantage by the bargain. See Shephard's Contract Act, p. 105.

Perundevitayar Ammal *v.* **Nammalvar Chetti**, I. L. R., 18 M. 390. The deposit of money with a banker is in its nature a transaction perfectly distinct from a loan given by one person to another. The learned judges have rightly emphasized the distinction by holding that limitation runs only from the date of demand for the return of the money.

Seshamma *v.* **Subbarayudu**, I. L. R., 18 M, 403. We are afraid that their lordships, (*Muthuswami Iyer and Best, J.J.*) while affirming that demand and refusal are no part of the cause of action for a claim to maintenance are practically making them necessary to entitle the plaintiff to relief. We agree that it is not in every case where the widow lives apart she is entitled to recover arrears. But it seems to us that her title to arrears should not be practically limited to a case where she has made a demand and been refused. Their lordships have

taken a position which is somewhat self-contradictory? They say that demand and refusal are not necessary to entitle a person to sue for maintenance but demand and refusal are practically deemed necessary to entitle her to arrears. The absence of demand and refusal may be evidence that separate maintenance is not claimed but that alone seems hardly sufficient to decide the matter.

Krishnabhupali Devu *v.* **Ramamurti Pantulu,** I. L. R., 18 M, 405. It seems to us that even though a plaintiff is out of possession he may sue for a mere declaration unless the defendant sued is in possession. Where tenants are in possession and they are ready to pay the rent to the person who succeeds in establishing his title the plaintiff is perfectly justified in confining his prayer to a mere declaration. If the tenants would recognize neither the plaintiff nor the defendant as their landlord even then the plaintiff may claim a mere decree declaring his right against the defendant. Whether in a case where the tenants are paying rent to the defendant the plaintiff should confine his prayer to a mere declaration seems more difficult of solution. The further relief which the plaintiff should claim as consequential is limited to what is obtainable by the plaintiff *against the defendant.* See *Subrahmanyan v. Parameswaran.*—I. L. R., 11 M, 116 *Lokhanath Surma v. Keshabkam Doss* I. *L. R.* 13 C. 147.

Shungunhi Menon v. Verappa Pillai I. L. R., 18 M, 407. The Malabar Tenants Improvements Act has not been understood by anybody concerned in the administration of it. Sub-Judges and District Judges have awarded sometimes fifteen year's purchase and sometimes twenty and capitalized the annual produce for the period yet to run after deducting the period that has run out since the improvements were effected from the number of *years' purchase awarded.* Sometimes Judges have awarded the cost of the improvements and sometimes the entire value of the increased return and the High Court has helplessly confirmed all these decisions. The Legislature tried to effect a compromise between conflicting views, one that the jenmi was the absolute owner and the other that the kanom holder or tenant had an interest in the soil which deserved to be perpetuated. We are afraid that the Legislature has expressed the compromise in somewhat unhappy language:—But we must say that the authors of the measure would be surprised at the construction now placed by the High Court in its latest effort at understanding the Act. Mr. Justice Parker, declares that the tenant is to have nothing more than the cost of the improvements.

Venkatappa Naynim *v.* **Timma Naynim**.—I. L. R. 18 M, 410. We cannot help doubting the correctness of the position that in a suit for partition, a compromise according to which a decree may be passed should be a dismissal of the suit or a denial of the whole or part of the claim. The learned Judges allow that it falls within the scope of the suit to declare that some of the property is impartible, but say that it should not be a term of the compromise that the younger members should be maintained by the eldest who takes the bulk of the estate as impartible property. It is evident to the learned Judges that stipulations for maintenance do not relate to a suit for partition because such reliefs could not have been decreed had the parties proceeded to trial. We think the view here laid down is questionable. We think the words "so far as it relates to the suit" mean that all matters which are so connected with the particular dispute as to fall within the ordinary scope of the contentions of the parties may be embraced in the compromise.

Krishnaswami *v.* **Sundarappayar**, I. L. R., 18 M, 415. We do not see any reason to change our opinion that a contract by a minor is void under the Contract Act and not merely voidable. *Muthusamy Aiyar* and *Best J. J.*, agree in the Calcutta view that the contract is only voidable. Elsewhere we have expressed our reasons for not accepting their view as correct, See. I. M. L. J., p. 226. But the contract by a guardian on behalf of a minor stands entirely on a different footing. The law clothes the guardian with authority to contract and such a contract cannot be even avoided by the minor on his coming to full age. The contract is also specifically enforceable as a guardian who contracts and the contractee are *sui juris*. No exception can therefore be taken to the view of the learned Judges that the case of *Flight* v. *Bolland* 4 Russ 298 has no application in this country.

Husananna *v.* **Lingana**, I. L. R., 18 M, 423. The point decided by the Full Bench is of course sound law. But the observations made in the Judgments of the learned Judges seem somewhat questionable. The question as to how far decrees in accordance with awards passed upon reference by parties or by the Court are appealable, has perplexed the courts for a long time and it is much to be regretted that the language of Sections 521 and 522 should not have been framed with greater regard to accuracy. Looking at the question apart from authority, it seems plain that a decree in accordance with an award which has to some extent the force of a consent decree as parties have consented to the arbitration, should not be liable to appeal as regards the correctness whether upon a question of fact or law of the award of the

arbitrators. It seems equally plain to us that upon every other question there should be an appeal; and we cannot conceive how the right of appeal has been forfeited by the parties merely because they consented to the arbitration. Whether the alleged private reference is a forgery or the award is not genuine or the persons who purported to make the award were not the persons authorized to make it or the arbitrators are charged with corruption, or to have exceeded the scope of the *submission*, are all questions on which the party is entitled to the opinion of the appellate tribunal. A regular suit can be instituted upon an award made, instead of the procedure prescribed in the code being adopted and all the above questions could be raised by one or the other party to the suit and the judgment of the appellate as well as that of the original tribunal obtained upon them. We cannot see how a party stultifies himself by adopting the cheaper and somewhat more expeditious procedure of the code, while the decision of the Court will have all the force of *res judicata* just as much as if it was pronounced in a regular suit. The Full Bench has held that where the *submission* to arbitration is challenged as not genuine there is a right of appeal and we take it the reasoning covers a case where the submission is genuine, but the award is no legal award in the sense that it is not genuine or that it was not pronounced by the arbitrators named. The language of S. 522 has no doubt to be somewhat strained to admit of these exceptions. But the principle upon which these exceptions are engrafted necessitates the concession of the right of appeal in all the cases we have enumerated.

We doubt also the correctness of the view of Parker J., that if the award and the consent to arbitration are substantially disputed the special jurisdiction created by Ss. 525 and 526 is ousted.

Kumbalinga Pillay *v.* **Ariyaputhra Padayachi**, I. L. R. 18. M, 436:—The decisions under Sections 317 C.P.C, are in a somewhat unsatisfactory condition. The Section is aimed at discouraging benami court sales as they open a door to fraud. Probably the section is limited to a dispute between the certified purchaser and the person calling himself the real purchaser. But we are unable to see the propriety of engrafting exceptions to the rule so limited on the ground that the certified purchaser was the agent of the real purchaser and should not be allowed to defraud his principal. In one sense the certified purcahser is in all cases the agent of the real purchaser if that be a different person. And if the principle of agency is to be the basis of an exception, S. 317 may be repealed altogether. A subsequent special contract by the certified purchaser to convey, may stand upon a

different footing if supported by consideration. But to say the certified purchaser was the agent and should not be helped to defraud the principal is to practically abrogate the section.

Baksha Sahib *v.* **Venkatachala Mudali**, I. L. R. 18, M, 439—This decision no doubt follows the decision of the High Court in *Vallaban* v. *Panguni* 12 M. 454. Though the learned Judges say that the latter decision does not govern the present one, the reasoning of both the decisions is the same. We have expressed our doubts as to the correctness of the decision in *Vallaban* v. *Panguni* 12 M. 454 See. I. M. L. J. N. 216. The learned Judges rely upon the language of Section 293 where it says that the money should be recoverable from the defaulter under the rules contained in the chapter for the execution of a decree for money. We think these words simply authorize the procedure prescribed regarding the execution of a decree.

Nor does the analogy of S. 411 seem to help us. There also it is simply the procedure that is sanctioned. We do not accept the correctness of the decisions which hold that the Secretary of State has a right of appeal in execution of an order as to costs in a pauper suit. The Bombay High Court has rightly refused to regard the section as sanctioning a right of appeal. The analogy if correct may fairly extend to all cases in which an order as to costs in any proceeding is being executed. The language of the Section in the chapter relating to costs is similar to the words used at the end of Section 293. We therefore respectfully differ from the view of *Shephard* and *Best J. J.* that there is a right of appeal on an order relating to the realization of the difference in the purchase *money* from the defaulting purchaser.

SUMMARY OF RECENT CASES.

Tenant for Life and Remainderman—Payment of Charge on Inheritance—Presumption of Intention to keep alive Charge—Relation of Parent and Child.

In re **Harvey**. **Harvey** *v.* **Hobday** [1896, Vol. I, Ch. p. 137, C. A.]

Where a tenant for life pays off an encumbrance on the inheritance the presumption of law is that he does so with the intention of keeping the encumbrance alive for his own benefit and the onus is on the remainderman to show that under the circumstances of any particular case the presumption does not apply. The fact that the tenant for life and the remainderman stand in the relation of parent and child is no

doubt a material circumstance, but in itself it is not sufficient to rebut the general presumption.

Copy right—Design—Infringement.

John Harper and Co., Limited *v.* Wright and Butler, Lamp Manufacturing Company, Limited [1896, Vol. I, Ch. p. 142 C. A.]

Where a design is registered as applicable to pattern, shape, and configuration without any distinct claim to any or each of these individually, the registration applies to the design as a whole, and it will be protected although in one of those it may not be novel.

In order to constitute an infringement of a copy-right it is enough if one of the designs is an obvious imitation of the other. The eye must be the judge and the questions must be determined by placing the designs side by side and asking whether they are the same or whether the one is an obvious imitation of the other and differences in detail will not make an obvious imitation the less an infringement.

The plaintiffs registered a design for an upright hexagonal metal stove, the sides of which bore the representation of a gothic church window with tracery above and below. The defendants produced a hexagonal upright stove with a window of a different style and different tracery, the general appearance of the stove being similar to that of the plaintiffs'.

Held:—That the defendant's stove was obvious imitation of the plaintiff's stove and an infringement of his copyright.

Insurance (Marine) against Fire.

Woodside *v.* Globe Marine Insurance Company, Limited [1896, Vol. I., Q. B., 105].

Whether the subject matter of an insurance be ship or goods, the valuation is the amount fixed by agreement at which in case of loss the indemnity is to be calculated. It is that valuation put on the subject matter at the time of agreement that determines the underwriter's liability. Such valuation cannot be re-opened for subsequent enhancement or depreciation in value of the subject matter.

The plaintiff's vessel was insured by the defendants by a valued time policy against loss or damage by fire. While so insured she was driven ashore and sustained such serious injuries that the cost of repairing her would have been greater than her value after repair. Shortly afterwards, the vessel was totaly destroyed by fire,

In an action by the plaintiff on the policy, *Held* :—that the defendants were liable for the full amount while the vessel was insured.

Officer of the Crown—Tenure of office.

Dunn *v.* The **Queen** [1896, vol. I. Q. B., 116. C. A.] Persons employed in the service of the crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the crown and no engagement made by the crown with any of its civil, military or naval officers in respect of services either present past or future can be enforced in a Court of Law. It is essential for the public good that all services under the crown should be capable of being determined at the pleasure of the crown and should not exclude itself from the exercise of such power by any stipulation to the contrary—vide *Shenton v. Smith* [1895 A. C. 229] M. L. J. Vol. V. p. 296.

Insurance (marine)—Loss of Merchantable character—liability of under writers.

Asfar and Co. *v.* **Blundell and another,** 1895 Vol. I. Q. B. p. 123 C. A. In contracts of marine insurance the assured is bound to disclose every material fact which is within his knowledge, and which is not to be taken as being within the knowledge of the underwriters. The rule is satisfied if the assured discloses facts sufficient to call the attention of the underwriters in such a manner that they can see that if they want further information they ought to ask for it.

The plaintiffs chartered a ship for a lump sum and put her up as a general ship, and goods were shipped under the bills of lading at freights the total of which exceeded the charter freight while in the course of loading, the plaintiffs insured their " profit on the charter " for 2,000 £ with the defendants who accepted the risk on ship. The Defendants, were not informed, and did not inquire as to, and did not know any of the terms of the charter party, or bills of lading, nor that the charter was for a lump sum. A portion of the cargo of the ship consisted of dates The ship in its voyage was sunk and subsequently raised. The dates were so spoiled that they were not merchantable as dates although they were of considerable value for the purpose of distillation.

Held :—That freight was not payable in respect of the voyage that as the amount of the freight payable under the bills of lading was less than the charter freight and the charter's profit was consequently lost, there was a total loss of the subject matter of the insurance, and that the obligation on the part of the plaintiffs to specifically disclose was sufficiently satisfied.

Jino v. Manon.

Plaint—inconsistent reliefs.

Held, that the fact that a plaintiff claims in his plaint two alternative reliefs which are inconsistent with each other is no ground in itself for the dismissal of the suit *Iyappa* v. *Ramalakshmamma* (I. L. R., 13 Mad., 549) dissented from. *Mohomed Buksh Khan* v. *Hooseini Bibi* (L. R., 15 I A., 86) referred to. Weekly Notes, Allahabad.

Salima Bibi v. Sheikh Muhammad,

Cause of action, definition of—Misjoinder of causes of action.

The term cause of action as used in Sections 31 and 45 of the Code of Civil Procedure is there used in the same sense as it is used in English Law, *i.e.*, a cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove the fact, but every fact which is necessary to be proved.

Where three plaintiffs brought a joint suit for the possession of immoveable property, in which two of them were claiming half the property under a title by inheritance and the third was claiming the other half of the property in virtue of a sale thereof to him by the first two plaintiffs, *held*, that the suit as framed was bad for misjoinder of causes of action and that the plaint should be returned that the plaintiffs might elect which of them should proceed with the suit.—Weekly Notes Allahabad.

Abbasi Begam v. Nanhi Begam,

Pauper application—Payment of Court fee—Limitation.

A. B. applied for leave to sue as a pauper for the recovery of certain dower alleged to be due to her. Upon her right to sue as a pauper being disputed by the persons proposed by her in her application for leave to sue as a pauper, as defendants to the suit, A. B. paid into court, the court fee necessary for a regular suit to recover the amount claimed, and prayed that her original application might be treated as the plaint in the suit and the suit proceeded with in the ordinary manner. In the meantime, however, the period of limitation prescribed by Art. 104 of Sch. ii of Act XV of 1877 for a suit to recover deferred dower had expired. *Held* that the suit was barred by limitation and that S. 5 of Act No. XV of 1877 could not be applied. *Skinner* v. *Orde* (I. L. R., 12 A., 241, S. C., 4 C. 4 C. L. R., 351) distinguished. *Balkaran Rai* v. *Gobind Nath Tiwari* (I. L. R., 12 A., 129), *Jainti Prasad* v. *Buchu Singh* (I. L. R., 15 A., 65), *Naraini Kuar* v. *Makhan Lal* (I. L. R., 17 A., 526) referred to—Weekly Notes, Allahabad.

Kundan Lal v. Chet Ram.

Sale in execution—suit to set aside sale.

One S. L. in a suit upon a mortgage obtained a decree for sale of two houses. K. L. objected that one half of one of the said houses was his and should not be made liable to sale in the suit of S. L. That objection was granted, but nevertheless, the decree was prepared as for the sale of the two houses without any exception. Under this decree the two houses were sold, and were purchased by C. R. who duly obtained a certificate of sale. Subsequently K. L. having obtained amendment of the decree under which the sale had taken place, brought a suit against S. L., the decree holder, and C. R., the auction purchaser, to recover one half of one of the houses sold. *Held* that the title of the auction-purchaser was good, and that the suit would not lie. *Kushal Panachund* v. *Bhima Bai* (I.L.R., 12 B. 1589) referred to.—Weekly Notes Allahabad.

Sheoratan Kunwari *v.* Ram Pargash.

Act No. XX of 1863 (Religious Endowments Act—Bengal Regulation No. XIX of 1810—Civil Procedure Code, S 539—Trust—nominatoin by founder.

The Maharaja of B. in 1862 assigned certain lands situated in Bengal for the maintenance of a temple at Chauria in the Gorakhpur District, and appointed certain trustees of the endowment. Those trustees dealt with the property in a manner inconsistent with the trust by making alienations thereof as if it were their own private property. In 1893, the representative in title of the original settlor sued in the Court of the District Judge of Gorakhpur to have certain alienations made by the said trustees set aside and the property restored to its original uses, and for the appointment of a new trustee or new trustees in place of the trustees—defendants to the suit.

Held, that such a suit was rightly brought under S 14 of Act No. XX of 1863, and that it was not essential for the application of that act that the endowment should ever have been taken under the control of the Board of Revenue. *Ganesh Singh* v. *Ram Ghulam Singh* (5 B. L. R, App. 55,) and *Dhurrum Singh* v. *Kissen Singh* (I. L. R, 7 C., 767) approved. *Raghubar Dial* v. *Kesho Ramanuj Das* (I. L. R., 11 A., 18) quoad hoe over ruled.

Held also that S. 539 of the Code of Civil Procedure was not applicable to the above suit *Lakshman Das Parash Ram* v. *Ganpatrao Kristna* (I. L. R, 8 B., 365) and *Jawahra* v. *Akbar Husain* (I. L. R., 7 A., 178) referred to.

Held also that there being no special provision in the endowment for the appointment of trustees the right of nomination remained vested in the founder of the endowment and that the right to nominate continued to his heirs. *Gossamee Sree Greedharreejee* v. *Rumanlolljee Gossamee* (I. L. R, 16 I A, 137, S. C., I. L. R, 17 C, 3) Referred ot—Weekly Notes Allahabad

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JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following Legal publication :—

The Madras Case Law on the Madras Rent Recovery Act by P. Appiah Pantulu.

The Educational Review for February 1896 (*in exchange.*)

Law Book News for December 1895 (*in exchange.*)

Green Bag for February 1896 (*in exchange.*)

The Law Digest and Recorder for January 1896 (*in exchange.*)

Harvard Law Review for February 1896 (*in exchange.*)

Allahabad Weekly Notes for February 1896 (*in exchange.*)

Kissing the Bible.—There seems to be a reasonable probablity of the speedy decease of the barburous practice of swearing witnesses by making them kiss the Testament, and of the general adoption of the Scotch form of taking the oath made optional by the Oath's Act, 1888, which is at once more solemn and more suited to modern ideas and sanitary science. In view of the danger of contagious disease being spread through the handling and the kissing of the New Testament by persons of all sorts and conditions, in the ordinary form of the administration of the oath to a witness, it is to be hoped that other county Judges, and also Justices and Coroners, will follow the lead of Judge Emder and that the oath in scottish form will in the end be encouraged even by the more prejudiced and belated among the Judges of the High Court.—*The Law Journal.*

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Unpleasant Truth.—'Truth,' said Mr. Justice Williams, 'can never do much harm, and Lord Esher has now capped this epigram by declaring that, were it the truth that he were the son of a washerwoman, he should have no objection to be so described. Probably he would say, like Sir Edward Sugden when taunted with being the son of a barber. True, I am a washerwoman's son to the end ; Cleanliness is next to Godliness, and the vocation of a washerwoman is honorable withal, but the term 'washerwoman'—innocent in itself—has gathered an artificial and quasi—opprobrious meaning—an innuendo not exactly libellous, but

disparaging—so much so that it has been abandoned in favour of the genteeler word 'laundress'. Language has a very subtle significance of its own, and with all deference to Lord Esher, we cannot but think that when one litigant calls another the son of a washerwoman he is poisoning his forensic weapons with prejudice.—*The Law Journal.*

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Cases of the year 1895.—The most notable of the cases of the past year are probably the decisions of the House of Lords in *Trego* v. *Hunt* and of Mr. Justice Williams and the Court of Appeal in *Broderip* v. *Salomon.* By the former, Lord Romilly's much discussed ruling in *Labouchere* v. *Dawson* was finally approved, and a partner was restrained from making use of the firm's books to compile a list of customers for the purpose of endeavouring to destroy the good will of the business, in which, on the dissolution, he was to lose all interest. With this judgment may be mentioned also two other cases in which the law has been invoked to protect the good will of a business, and has proved to be more favourable to the owners of it than was till recently believed to be the case. In *Robb* v. *Green* a discharged servant was restrained from using a list of customers which he had surreptitiously compiled during the term of his employment, and in *Louis* v. *Smellie*, the defendant, under similar circumstances, was prevented from availing himself of trade secrets similarly acquired. The other important decision first mentioned above, *Broderip* v. *Salomon* (which, however, is subject to an appeal to the House of Lords,) has struck a formidable blow at the prevalent practice of turning failing businesses into 'one man-companies'. It shows that the vendor, after agreeing with his own puppet for the transfer to it of his trading liabilities, without his trading assets, may eventually find himself landed with all its debts. Several other cases have been reported also during the year in which the vigilance of the company—judge was proved too much for the wiles of the vendor—promoter. Thus in *In re Carey* the company was held to be the agent of a vendor who, as managing director, has retained control of a corporation in which there were no independent shareholders at all, and carried it on for his own benefit.

The equity cases reported up to date appear to be rather less numerous than usual, but they are of at least average interest. In regard to trusts, the most striking change, perhaps has been the declaration of Mr. Justice Kekewich that 3 per cent. instead of 4 per cent. should now be reckoned as between life—tenant and remainder-man where a mixed fund representing capital and income has to be divided (*In re Goodenough*

and *In re The Duke of Cleveland*); but the same Judge has held that a trustee is to be charged interest in respect of a breach of trust at the higher rate as heretofore. A valuable judgment of the Court of Appeal has apparently settled for the present the class of cases in which damages may be given by a Court of equity under Lord Bairns' Act in lieu of an injunction, limiting it to cases where the damage is small, capable of, estimate in money, and of being adequately compensated by a small sum and where the grant of an injunction would be oppressive. It is understood, however, that *Shelfer's case*, in which this rule laid down, is on its way to the House of Lords. A decision of both Courts of Appeal not very long ago was believed to have made the grant of an interlocutory injunction to restrain the publication of a libel practicably unobtainable for the future, but in *Trollope* v. *The London Building Trades Federation.* Mr. Justice Kekewich made an order restraining the publication of a black list until the trial, and the Court of Appeal, in affirming his order showed a marked inclination to narrow their former ruling. The old practice of the Court of Chancery to refuse specific performance if the purchaser would get no title, even though upon the contract he has shut himself out from raising the objection which would have disclosed the fatal defect, was approved by the Court of Appeal in *In re Scott* and Alvarez's contract, but under such conditions the vendor may still obtain damages for breach of contract, and the purchaser cannot get his deposit back (*In re The National Provincial Bank and March*). It has also been determined as between vendor and purchaser that, in seeking to exercise the usual option to rescind, the vendor must act *bona fide*, and, if he keeps the purchaser waiting to see whether a better offer will come off, he may find his option is barred (*Smith* v. *Wallace*). The doctrine of consolidation of mortgages is now ill thought of, but it still holds good in cases directly falling under the principles of the old cases, as in *Pledge* v. *Carr*, where the transferee of two mortgages sought to enforce the right to consolidate against an assignee of the holders of the equities in both properties, their assignments being subsequent in date to the transfers.

The settled land Acts have received little fresh interpretation during the year, the only point to be mentioned being a decision that there is jurisdiction, since 1890, to re-imburse out of capital money expenditure which the tenant-for life has made without the authority of the Court. Life-tenants will be ill advised, however, in relying upon the decision in *Tucker's Settled Estates*, for, the Court there declared that its powers in the matter ought to be very sparingly used. Two partnership cases of great interest to Solicitors are reported. In *Rhodes* v. *Moules* the part-

ners of a defaulting Solicitor, who had fraudulently obtained possession of securities from a client of the firm on a false pretence that another client required collateral security for a loan made to the owner of the securities, were held to be liable for the loss; but in *Mara* v. *Browne* the partners were held to be not liable for a breach of trust committed by one who was found to be an obstructive trustee. The legal privileges of married women have been extended by a decision that the restraint on anticipation extends to protect arrears of income (*Loftus* v. *Hunt*). 'charity' (*In re Faveaux*); but the laudable practice of yacht racing is not (*In re Nottage*). And with these rulings for the information of conveyancers may be bracketed the determination that under the Mortmain Act of 1891 future interests in land may be devised to charities (*In re* Hume).

The company cases of the year have been numerous and important, although it is probable that the Bill drafted upon the report of the committee on which so much legal learning was lately expended will shortly render some of them obsolete. *Broderip* v. *Salomon* has been already mentioned. Next in note come *The Balfour Group cases*, which have not only shown the dangers of the Criminal Law for delinquent officers, but also that a higher standard of duty is expected by the Civil Courts of auditors than had been commonly supposed, though not, it may be hoped, than had been usually attained. After some conflict of decision it is settled for the present that a declaration of charge ought properly to be inserted in the Judgment in a debenture-holder's action, (*Marwick* v. *Lord Thurlow*). The nature of a floating security is further elucidated by the decisions that debenture-holders can claim chattels seized under a *fi. fa.* from the Sheriff (*Taunton* v. *The Sheriff of Warwick*); and that a garnishee order is good against them (*Robson* v. *Smith*); and that although default has been made by the company, the debentures continue to 'float' until some step to make them attach is taken on behalf of the holders. A stock-broker's commission for placing shares may in the opinion of the Court of appeal be duly paid, notwithstanding a conflicting earlier decision of Mr. Justice Kay (*The Metropolitan Coal Consumer's Company* v. *Scrimgeour*). On the other hand, the Court has declared that there is no way in which shares can be issued at less than the nominal price without subjecting holders with notice to the liability to pay up the difference (*In re the Railway Sine Tables Publishing Company*). (*In the Theatrical Trust Lim*). Mr. Justice Williams, after examining the cases usually noted under Section 25, stated, as the result of them, that where a contract is duly made and filed for the issue of shares as fully paid, the Court has never treated the

shares as not so paid unless the consideration is shown to be illusory, or it appears by the contract itself to be obviously assessable at a money value less than the nominal amount of the shares. The question of payment of dividends where the capital is depreciated or depreciating has several times come before the Courts, but no clear rule, except the obvious one that they must act in good faith, has so far been provided for the guidance of directors. And lastly for the comfort of liquidators, it has been determined that an order for costs where the liquidator is an unsuccessful respondent will not be made against him personally (*In re R. Bolton & Co.*) No patent case of special importance has been decided, the numerous cases printed in the Patent Office Reports turning almost entirely upon questions of fact. Several patents for 'patent medicines' have been revoked at the instance of the Pharmaceutical Society, and, upon a petition for revocation, according to *In re Deeling's Patent*, it is now determined that the patentee is not estopped from asserting the validity of his patent by a Judgment of invalidity in a previous action to which the petitioner was a party. In trade-mark, on the other hand, some valuable Judgments have been delivered. *Reddaway* v. *Bonham*, explaining the recent case of *Reddaway* v. *Bentham*, has shown that no monopoly in a discriptive name (in the case of in question "camel hair belting") can be acquired so as to prevent the name being used for the thing which in ordinary language it properly describes. *Mazawattee* has been held to be, and *Trilby* not to be an 'invented word,' and '*Shakspeare*' not to be registerable as a fancy word. In the *Trilby Case* Mr. Justice North held that proper names of persons cannot be registered as 'words' at all. This is a new reading of the Act, but the case is under appeal.

In the legal records of 1895 the year will be remembered for the restriction it has witnessed of several old and indefinite causes of action founded on 'malice.' An intent to injure a water authority so as to make it buy out a land-owner will not enable the Court to restrain the latter from cutting off springs upon his own ground (*The Corporation of Bradford* v. *Pickles*), nor will the malicious perversion of his Judicial powers by the Judge of a Court of Record enable an oppressed litigant to sue him for damages (*Anderson* v. *Gorrie*). On the other hand, in *Flood* v. *Jackson*, one of several trade union cases which have come before the Courts, the rule that an action will lie for maliciously inducing a master to discharge a servant, or not to engage a person whom but for the the wrongful inducement he would have engaged as his servant, was affirmed and applied. In *Lemmon* v. *Webb*, a common law case which reached the House of Lords from the Chancery side, the ultimate Court of Appeal, after an examination of many ancient authorities, held that

overhanging trees may be cut by the neighbouring landowner as a nuisance without giving notice to the owner of the trees to remove them, and that neither the Statutes of Limitation nor the presumption of a lost grant confer a title upon the latter to occupy part of the space above his neighbour's close. The doctrines of nuisance with regard to interruption of the air flowing to a dwelling house, but not in a defined channel, were also elaborately reviewed by the Court of Appeal in *Chastey* v. *Ackland*, and an injunction to restrain interference with flow of air by the defendant's buildings was refused. The furnishing and money-lending businesses have been disturbed by several apparently conflicting decisions with regard to the operation of the Bills of Sale and Factory Acts upon the common hire-purchase agreements; but the House of Lords has at length decided that a document that confers only a conditional right on an option to purchase goods is within the purview of neither Statute (*M'Entire* v, *Crossley Brothers and Helby* v. *Matthews*). It has been held also that an assignment in a single deed of the 'reversion' in a piano let on hire together with the piano itself is severable, so that the former is well assured where the assignment of the latter is void as an unregistered bill of sale (*In re Isaccson.*) The decisions in *Robins* v. *Gray* that an inn-keeper's lien extends to goods of a third party lawfully in the possession of his guest, and in *Saren* v. *Roberts* that the implied warranty of habitability on the letting of a furnished house, does not extend to the continuance throughout the term of the demised premises' inhabitable condition are also worthy of mention. The important question, When is a sewer a drain? has been answered in a number of cases and generally to the prejudice of the local authority. In particular, it was decided in *Kershaw* v. *Taylor*, that the purchaser of a house without the licence of the vestry was not estopped by the wrongful act of his predecessor in title from alleging the combined drain to be a sewer.

Among the practice cases of the year the appearance of an 'action of review' in *Scott* v. *Alvarez*, is a curiosity. Owing chiefly to the operation of Finlay's Act, the number of these cases is far below the recent average, but two important rulings upon the Act itself require notice. An appeal from the refusal or grant of an interim injunction lies, not to the Divisional Court, but to the Court of Appeal (*M'Harg The Universal Stock Exahange*), and the power of the Judge at Chambers to refer applications to the Court no longer exists where an appeal from his decision ought to be taken to the Court of Appeal (*Hood Barrs* v. *Cathcart*).

Mr. Justice Matthew's Commercial Court has done much good work since its establishment. and it is steadily growing in popularity; But

Baerleion v. *The Chartered Mercantile Bank* shows that it possesses no exceptional powers.—*The Law Journal.*

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Lord Blackburn :—We regret to record the death of Lord Blackburn, which took place on Wednesday night, the 8th instant, at his residence, Doonholm, Alloway, Ayrshire. He was the second son of Mr. John Blackburn of Killearn, in the County of Stirling, by Rebecca, daughter of the Rev. Dr. Gillies, and was born in 1813. He was educated at Eton, whence he proceeded to Trinity College, Cambridge, where he graduated in 1835 as eighth wrangler, and was called to the Bar at the Inner Temple in Michaelmas Term, 1838. Mr. Blackburn established a reputation for legal learning by the publication, in 1845, of his well-known book on 'Sales,' which held its own as the leading text-book on the subject until the appearance, a quarter of a century later, of the late Mr. Benjamin's treatise. Like several of the occupants of the present Bench, and the Chancellor to whom he susequently owed his appointment, Mr. Blackburn spent several years of his life in Law reporting. In conjunction with Mr. Thomas Flower Ellis, he was engaged in the preparation of 'Ellis and Blackburn's reports'. The series was carried on for eight volumes, and was followed by the single volume of Ellis, 'Blackburn and Ellis,' published in 1858. On the promotion of Erle to the Chief Justiceship of the common pleas in 1859, Lord Campbell appointed his fellow countryman to a Puisne Judgeship in the Queen's Bench. It is related that Lord Campbell consulted Blackburn as to whom he should appoint. Blackburn mentioned several names, whereupon the Chancellor replied, "I do not think, Mr. Blackburn, that any of these gentleman would make so good a Judge as yourself". Mr. Blackburn was practically unknown to the public, and his appointment was disapproved of by the profession. In Lord Campbell's life an extract is given from his diary of July 3, 1859, in which he says. I have already got into great disgrace by disposing of my judicial patronage on the principle *detur digmoni.*' He goes on to say that Lord Lyndhurst and others had gallantly defended him in the House of Lords. Objection was taken that the new Judge was not a Q. C. But in the short debate in the House of Lords it was pointed out that neither Willes nor Lord Tenterdon had ever worn a silkgown, and the Lord Chancellor said: I know nothing of Mr. Blackburn except what I knew from having seen him practice in the Court over which I presided. I have no private intimacy and I declare on my word of honour I do not know of what side he is in politics. But I have known him as a sound, good, and able lawyer one of the ablest in 'Westminster Hall.' The opinion of Lord Campbell

was amply borne out by the subsequent career of the Judge. During his occupancy, from 1859 to 1876, of a seat in the Queen's Bench, Blackburn, who had learnt more from reporting than others do from practice, proved himself to be a learned and capable Judge. His career is identified with several most important Criminal and Civil trials. In 1863 he presided over the trial at the Central Criminal Court, of Buncher and others who had been engaged in extensive forgeries of Bank of England notes, and passed sentences of varying degrees, of severity, from penal servitude for life to penal servitude for four years. In 1865 he sentenced to death Ferdinad Kohl, a German, who had been convicted of the murder of a fellow-countryman, Fulorkop, in the Plaiston marshes. At his own request the prisoner was tried by a mixed Jury of Foreigners and Englishmen. The most famous trial, however, in which he was engaged was the special commission, of which the late Mr. Justice Mellor was also a member, sent to Manchester for the trial of the so called 'Manchester Martyrs'. Allen, Larkin, Gould, Maguire, and three were charged with the attempted rescue of Colonel Kelly and Captain Deasey from the prison van, and with the murder of Sergeant James Bret, on September 18, 1867. Twenty-six men in all were arraigned, but only five were convicted, and only three were hanged, Mr. Justice Blackburn pronouncing sentence. The learned Judge had to decide in the Queen's Bench, early in 1868, whether an information by the Attorney-General or an indictment would lie against Govenor Eyre on account of his proceedings in the suppression of a riot among the black population of the island of Jamaica. He held 11 and 12 Wm. III C. 121 and 42 Geo. III C. 85 by the provisions of which a Governor of a Colony, or other person in the public employment out of Great Britain, who has been guilty of any crime or misdemeanour in the exercise of his office, may be prosecuted in the Court of King's Bench in England, were applicable and that an indictment would lie. When the case came before the Grand Jury the learned Judge reviewed all the circumstances and pointed out the difficulties of the Governor's position, and in the result the bill was thrown out. Among the Civil cases brought before him was an action by a Mr. Wason against various Parlimentary leaders, in which Mr. Justice Blackburn in conjunction with Lord Chief Justice Cockburn and Mr. Justice Lush, decided that members of either House of Parliment are not liable for Civil or Criminal proceedings for statements made in Parliment. A question of privilege of a different character was also settled by the late Judge in 1873 in the case of *Dawkins* v, *Lord Rokeby*. He held that the previlege which exists with respect to statements made before one of the ordinary tribunals of the land also extends to a Court of Inquiry appoint-

ed by the Commander-in-Chief to investigate a complaint made by an Office, in the Army, and that the privilege is effectual even though the statements are not made in good faith. After seventeen years of service, in the Queen's Bench, Sir Colin Blackburn was, in October, 1876 together with the late Lord Gordon, created a Lord of Appeal in ordinary, under the Act of 1876, and on this occasion the approval of his appointment was general and emphatic. He took part in many important cases, both in the House of Lords and in the Privy Council, and seldom failed to make a valuable contribution to the judgments delivered. Among the most important decisions in which he shared were the many appeals in the liquidation of the City of Glasgow Bank. In the well known case *Wilson* v. *Waddell* his was the principle judgment by which it was decided that when mineral workings cause a subsidence and a consequent flow of rainfall into an adjacent mine, no damages can be awarded by the owner of the neighbouring mine. In *orr Ewing* v. *Colguhoun* he laid down valuable principles appicable to the public right of navigation in a river above the tide. In *Fairlie* v. *Boosey* he helped to settle questions of musical copy right. *Erlanger* v. *The New Sombrero Phosphate Company*, in which he took a leading part, was an important decision on the fiduciary position of the directors of the Company. He also gave judgment in two ecclesiastical cases which made a great stir at the time, One was *Julius* v. *The Bishop of oxford*, under the Clergy Discipline Act, which related to the alleged ritual excesses of Mr. Carter of Clewer, and the other was *Enright* v. *Lord Penzance*, when Lord Blackburn presided in the House of Lords. *Dalton* v. *Angus* in which he also assisted, and which was heard in 1881, is memorable, not only for the law laid down with respect to the right of *lateral* support for a building by adjacent land, but for the circumstance that it was the last occasion on which the judges were asked by the House of Lords to deliver their opinions. Lord Blackburn retired in 1886, owing to the state of omission in the Act of 1876, a retiring Lord of Appeal was no longer entitled to take part in the legislative business of the House of Lords, and an Act was immediately passed to repair the omission :—*The Law Journal.*

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Masonry abused—The *Chicago Legal News* (November 4th, 1895) relates a curious incident. In the superior Court of Anderson, Ind., on the above date one W. H. Freeman appeared in the interest of a client. William S. Devin was the judge. [He is a mason and prominent in other secret orders. The Masonic pin was worn. Freeman took a seat directly in front of the Judge. As the case proceeded he gave the Masonic sign

of distress. It was quickly recognized by the Judge and masons on the jury. The Judge told Freeman not to interfere with the proceedings, and as soon as an officer came in, sent Freeman to gaol on the charge of contempt of Court. Freeman belongs to the Masonic lodge at Centerville. He telegraphed to Masons at Kakomo for assistance. He denies that he made any Masonic sign, but the judge declares he did it boldly and for effect on the case. Freeman says he will appeal to the Grand Lodge for vindication.—*Law Magazine and Review.*

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Private International Law.—There have been several interesting decisions during the past four months.

Carrick v. *Hancock*, *Times* L. L., Vol XII; P. 59, was an action on a foreign Judgment obtained in the Swedish Courts against an English man domiciled and ordinarily resident in England. Objection was taken to it on the ground that the defendant had been served with the foreign writ while on a temporary visit to Sweden, and had only appeared and defended the proceedings by compulsion and for self-protection. The Lord Chief Justice, however, held that the proceedings were regular and the Judgment an enforceable one.

In the *Attorney-General* v. *Sadeley*, 15 Rep. (nov. P. 271) the question of what property is liable to Probate Duty under an English will was considered. A testator had died domiciled in England leaving to his wife his personal property, including money invested in mortgages on land in New Zealand. The wife subsequently died, also domiciled here, leaving all her property, including the above mentioned legacy, to Trustees for sale and conversion. The Court refused to follow the dicta in, *In the goods of Ewing*, 6 P. D. 19, and held that Probate Duty was not payable in respect of the Colonial mortgages. The Court said in its Judgment:—

"The executors could not have recovered it, (*i.e.*, the New Zealand mortgage debts) here virtute officii. It was no portion of her (The Testatrix's) Estate in England, and the general rule of Law appears to us to be applicable, by which amount of Probate Duty is to be regulated; not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the will or letters of administration, but by the value of such part as is at the death of the deceased within the Jurisdiction of the Court by which the probate is granted."

In another case of *the Bristol Wagon Co.* v. *Gray*, *Times* L. R. P. 64, it was held that the Court had no Jurisdiction under Order 11,

Rule 1 (e) to allow Service out of the Jurisdiction of a writ on a defendant domiciled or ordinarily resident in Scotland or Ireland, even where the subject-matter of the action was a contract in which the parties had expressly agreed to consent to such Service.

The fundamental rule as to the " proper Law of a Contract" so clearly laid down by the House of Lords in *Hamlyn* v. *Talisker*, 1894 (Ap. Cas.), 202 was well illustrated in the recent case of *Crossland* v. *Wrigley*, 73 and 7 R., P. P. 60 and 327, and 43 W. R., P. P. 572 and 673. A domiciled Englishman effected three policies of insurance on his life in a New York Office in favour of his wife and children. He died in 1892 and the question arose as to whether English or American Law governed the distribution of the policy monies. Kekewick, J., following the now well established rule, held that the intention of the parties must determine the law applicable, and that having regard to all the circumstances of the case, it was clearly intended that the interests to be taken by the beneficiaries should be decided by the " Law of the Domicile of the parties " insuring. The Court of appeal affirmed this view, Lindlay, L. J. Saying: " The policy was a policy and a " voluntary post—nuptial settlement in one.

We are concerned with the settlement aspect of the document, and with that the American Law has nothing to do. The Court of Appeal, however, did not enter into this point in detail, and the Judgment of Kekewick, J., is certainly curious. That the Law applicable should be the Law intended by the parties to apply, is, of course, well established, but it seems difficult to conceive that the parties could have had in their minds an abstruse legal conception such as the *lex domicilii*. It would seem more reasonable to suppose that they simply contemplated the Law of England *as such*, applying, regardless of whether it happened to be the *lex domicilii* or not (*Cf. In Re Barnard, Barnard* v. *White*, 56 L. T. R. 9). John M. Gover :—*Law Magazine and Review*.

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The appointment of Lord James of Hereford as a member of the Judicial Committee of the Privy Council will enable him to take part in the judicial proceedings of the House of Lords. By the Appellate Jurisdiction Act, 1876, it was provided that appeals to the House of Lords should be heard and determined by Peers who held or had held 'high judicial office'; and in this expression the Appellate Jurisdiction Act, 1887, included the office of a member of the Judicial Committee of the Privy Council. Lord James is the recipient of an

honour the value of which lies partly in its rarity. The Act of 1833 which created the Judicial Committee, after defining the status of the judicial personages qualified for membership, continued, 'provided nevertheless, that it shall be lawful, for His Majesty from time to time, as and when he shall think fit, by his sign manual to appoint any two other persons, being Privy Councillors, to the members of the said Committee.' :—*The Law Journal.*

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According to the Lord Chief Justice, who contributes to the *Strand Magazine* an article on 'the Bar as a profession,' there are four great qualities that are essential to success at the Bar. The first is 'love of the profession for its own sake;' the second is 'physical health to endure its trials'; the third, 'clear headed common—sense'; and the fourth, 'the ability to wait.' To the youthful aspirant who possesses these qualities the Lord Chief Justice promises certain success; but we are inclined to think that it would be possible for him, even if endowed with all these advantages, to find that the most durable quality he possessed was his 'ability to wait.' Lord Russel mentions that the only two men of weak phisique within his own experience who achieved marked success were Sir George Mellish and Lord Cairns. It is interesting to observe that one who was distinguished at the Bar for his eloquence does not attach much importance to oratorical power and illustrates the necessity for patience by stating that when he was 'a struggling Junior of four year's standing on the Northern Circuit,' he dined in frugal fashion with two young members of the Circuit who were almost in the depths of despair. One of these was considering the question of migration to the straits settlements, the other was thinking of going to the Indian Bar. Better things were in store for both. One is now Lord Herschell, the other the speaker of the House of Commons. :—*The Law Journal.*

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The extraordinary calculating faculty possessed by the late Mr. Bidder and inherited from his father, 'the calculating boy'—the power of mentally multiplying, for instance, fifteen figures by fifteen figures—seems little short of the miraculous; but, as Professor Galton has explained, the faculty is not so much a special gift of calculation or memory as an abnormal power of Visualising' numbers. We see it illustrated in a small way in spelling. People who spell well conjure up the vision

of the word, and know at once whether it is right or wrong. In mental arithmetic like Bidder's it is the same; the calculating prodigy sees the figures depicted in his mind as vividly as if they were written on a black-board, and the only limit to his powers as Mr. Bidder, Senior, once said, was the ability to register the various steps of a calculation as he proceeded. It is the same faculty which astounds us in blind fold chess-playing. The sightless player sees the board with all its pieces as a mental picture, and can keep it steadily before his mind's eye just as the calculating prodigy sees his figures. Observation has something to do with it. Hondin, the conjurer, tells us that he had cultivated his habit of observation to such an extent that, in passing a shop, he could take in all the peculiarities of fifty things at a glance and describe them accurately afterwards.:—*The Law Journal.*

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A Chairman's Law—A Poll Demanded:—In the midst of a stormy meeting of shareholders, a babel of voices, and angry altercation it requires great coolness and presence of mind on a chairman's part to state and apply rules of law. Yet the chairman who hesitates is lost. To mention only a few: A poll need not be demanded publicly; it is sufficient if the chairman acts on a private demand; the chairman is the person to grant the poll; the poll may be taken without special provision at the meeting at which it is demanded; when a poll is duly demanded the show of hands goes for nothing; to shut out and exclude a voter may invalidate the poll; it is for the chairman to decide as to the validity of proxies; the power to adjourn rests with the chairman; if the chairman improperly purports to adjourn or stop the meeting and leave the chair, the meeting can elect some other chairman and proceed; the chairman commonly may appoint scrutineers of the votes with the assent of the meeting; the chairman is not bound to wait for hours for voters to come in; a chairman has by common law no casting vote. Points like these crop up constantly and require prompt ruling. They are complicated, too by the construction of the articles. ;—*The Law Journal.*

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Gifts' Inter Vivos' From Clients To Solicitors:—It is generally well understood that Courts of Equity, although in general they will not disturb the enjoyment of benefits conferred by acts purely voluntary, and

will regard gifts from child to parent, from ward to guardian, or from *cestuique trust* to trustee, with considerable jealousy; but there is a corollary to the rule which, though at least as important as the main principle, does not seem to be equally well known—viz. that when the parties stand in the relation of solicitor and client, the solicitor is so immediately under the eye of the Court as one of its own officers, and the Court so anxiously regards the interests of the client, that although the gift of the latter to the former may be supported, it is indispensably necessary to show it to be *bona fide*; and that therefore it is essential to its validity that some professional man other than the donee should have the conduct of it, or at the very least that some indifferent third person should be privy to the whole transaction. This hard—and—fast rule is well illustrated by the recent case of *Liles* v. *Terry*, 65 Law J. Rep. Q. B. 34 in which the Court of Appeal held, overruling Mr. Justice Charles, that a voluntary assignment of lease-holds made by a client to a solicitor in trust for the client for her life, and after her death in trust for her niece (who was the solicitor's wife) for her seperate use, must be set aside solely on the ground that it had been executed without independent advice. The solicitor in point of law derived no benefit at all from the gift, which was expressed to be for the seperate use of his wife, and which, even had it not been so expressed, would have been her seperate property by virtue of the Married Women's Property Act. The case was therefore in this respect distinguishable from the case of *Goddard* v. *Carlisle*, reported in 9 Price 1 at p. 169. But it was clearly within the rule adopted in the leading case of *Huguenin* v. *Barclay*, and more recently in *Morley* v. *Loughnan*, 62, Law J. Rep. Chanc. 515, that the undue influence of the person procuring the gift enables the Court to take away the benefit of it from innocent third parties; or, to quote the memorable words of Lord Chief Justice Wilmot, 'let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it.' As regards solicitors and clients, it was this same principle of at all hazards protecting the client from the possible designs of the solicitor which, before the passing of the Attorneys and Solicitors Act, 1870 (33 and 34 Vict. C. 28), prevented solicitors from taking security from clients for future costs, or from agreeing to receive a fixed sum for costs of future business; but the indispensable necessity of independent advice has never been applied to the case of a testamentary gift. A solicitor may, therefore, allow a legacy to himself to be included in a will which he is preparing for his client, and will get the benefit of it if he survives, except of course, in cases of ordinary fraud or undue influence:—*The Law Journal.*

When will Deceit lie on a Broken Promise?—In a recent Missouri case, *Traber* v. *Hicks*, 32 S. W. Rep. 1145, the defendant had contracted with the plaintiff to do a certain thing, without disclosing that a previous contract with a third party prevented performance. The plaintiff brought an action of deceit. The argument that the defendant's wrong was a mere breach of contract was dimissed by the Court, and the plaintiff was allowed to recover on the ground that there was concealment of a material fact, namely, the outstanding agreement with the third party, which it was the defendant's duty to disclose. As the other elements of deceit were present, the case was without doubt rightly decided. It suggests the query as to whether the court would have been willing to go one step further, and hold the defendant liable for deceit if he had not put it out of his power to perform, but had merely intended not to perform, at the time he made the promise.

This question has not often arisen, as generally the simpler remedy is to be obtained in an action of contract. But it becomes material in cases where, for one reason or another, it is either inexpedient or impossible to obtain redress in the latter form of action. What little authority there is in point is in conflict. The latest treatise on torts contains an assertion to the effect that an action of deceit does not lie for failure to perform a promise, though the promisor never intended to perform, and the promisee has altered his position and suffered damage. 1 Jaggard on Torts, 583. And the view that such an Act is not fraudulent has been taken by a few Courts. *Fenwick* v. *Grimes*, 5 Cranch C. C. 439; *Banque Franco-Egyptienne* v. *Brown*, 34 Fed. Rep. 162, 192. On the other hand, it is generally held that preconceived design in a buyer not to pay for the goods is such fraud as will vitiate the sale. (See the exhaustive opinion of Doe, J. in *Stewart* v. *Emerson*, 52 N. H. 301). And in other cases a promise made without intent to perform, merely to induce some Act on the part of the promisee, has been held fraudulent. *Dowd* v. *Tucker*, 41, Conn. 197; *Goodwin* v. *Horne* 60 N. H. 485.

The simple question, apparently, is whether there is any misrepresentation of a present fact. As a promise relates to the future, Courts have jumped at the conclusion that there is none. But a promise to do an Act in the future certainly carries with it a representation of present intention to perform, just as certainly as the promise in *Taber* v. *Hicks* included a representation that the promisor had not put it out of his power to perform. And that a representation of present intention

is a statement of fact which has rarely been disputed since Bowen, L. J., declared, in *Edington* v. *Fitzmaurice*, L. R., 29 Ch Div. 459, that "the state of a man's mind is as much a fact as the state of his digestion." If, then, this misrepresentation of a present fact is accompanied by the other elements of deceit, it seems clear on principle that the action should be allowed. See 1 Bigelon on Fraud 484, whether or not it would be expedient in practice is quite another question.—*Harvard Law Review.*

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Carriers—Sleeping Car Companies Liability for Money lost by Passenger.—The plaintiff sues the Pullman Company for a sum of money lost at night while he was a passenger on one of its cars. *Held*, the company's duty is to maintain such a watch "as may be reasonably necessary to secure the safety" of such of the passenger's goods as are properly in his possession as a traveller. If the loss occurs while the passenger is asleep, the burden is on the company to prove such cases. *Kates* V. P. P. C. Co., 23 S. E. Rep. 186 G. A.

Ever since sleeping cars have been in general use, the courts with almost uninterrupted regularity have decided that inasmuch as the sleeping car companies are neither inn-keepers nor common carriers, they are not under the extreme liability attaching to these occupations, P. P. C. Co., v. *Smith*, 73, Ill, 360; *Blum* v. S. P. P. C, Co., 1 Flippin, 500; *Lewis* v. N. Y. P. C. Co., 143 Mass, 267. The Georgia Court discusses the relationship of the company to the passenger on its own merits, and notwithstanding the necessity which the sleeping car has become, the defenceless condition of the passenger, and the consequent resemblance to that state of facts which developed the heavy responsibility of the inn-keeper reaches the same conclusion as the case cited. The single case opposed to the current of authority is *P. P. Co.* v. *Lowe*, 28 Neb. 239, holding the company an inn-keeper;—*Harvard Law Review.*

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Conflict of Laws—Foreign Judgments—Conclusiveness.—*Held*, Judgments rendered in France, by whose laws judgments of the United States Courts are reviewable on their merits, are not conclusive when sued upon in the United State, but are only *prima facie* evidence of the justice of the plaintiff's claim (*Fuller C. J. Harlan, Brewer, and Jackson J. J.* dissenting.) *Hilton* v. *Guyot*, 16 S. C. R, 139,

The case presents a fundamental question, and one likely to occur very often. The decision, therefore, is of more than ordinary importance. On strict common law principles it can hardly be supported. It has long been settled that our courts will respect and enforce private rights acquired under foreign laws, and it is difficult to see why a right acquired under a foreign judgment does not come within the category. The fact that France does not recognize United States judgments as conclusive would seem to be a political argument, rather than a legal ground, for refusing to recognize the judgments of France. It presents a question of the comity of nations. The court falls, into the error of supposing that comity means reciprocal courtesy. If comity is a part of the common law, as we believe it to be, the courts have no discretion to apply it in one way to one country and in another to another country. The dissenting opinion of M. Chief Justice Fuller seems entirely sound.

The decision follows the rule adopted in most of the Continental countries, and which was formerly the rule in England. *Roach* v. *Garvan* 1 Ves. Sr. 157 ; but has since been disapproved by the English courts, which now hold that foreign judgments are impeachable only on the ground of fraud or lack of jurisdiction. *Nonvion* v. *Freeman*, 15, App. cases 1, 9; *Goddard* v. *Gray*, L. R, 6 Q. B, 139—148. Some of our State courts are in accord with the modern English doctrine, and treat foreign judgments as conclusive *Dunstan* v. *Higgins*, 138 N. Y. 70 (1893), *Rankin* v. *Goddard*, 55 M, 389; *Baker* v. *Palmer*, 83 Ill, 568.—*Harvard Law Review.*

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Conflict of Laws—Foreign Judgment—Service of Process.— A defendant who is duly served with process while temporarily in Sweden, and who appears by Attorney, is amenable to the jurisdiction of its courts, and a judgment against him will be enforced in the courts of England. *Carrick* v. *Hancock*, 12 *The Times Law Rep.* 59.

A foreign judgment *in personam* obtained without service of process on the defendant is internationally invalid, but if the defendant appears, though under protest, any judgment will be enforced by the courts of his domicile if the court of original judgment has jurisdiction. *Voinet* v. *Barret*, 58 L. J. Q. B, 39, *Boissiere & Co.* v. *Brockner & Co.* 6.—*Times Law Report*, 85.

The court holds also that the duty of allegience correlative with the protection given by the state to every one within its territory, and that a

valid service of process may be made upon a defendant as soon as he enters the country; irrespective of the time he intends to remain:—*The Harvard Law Review.*

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Equity—Assignment for Benefit of Creditors—Marshalling Assets;—Where a debtor made a general assignment for all his creditors, it was held that a creditor whose debt was partly secured by a lien on specific property could recover from the assignee on the basis of his whole debt without deducting the amount which he would realize on his seperate lien. *Winston* v. *Biggs* 23; S. E. Rep. 316 (N. C.)

In many States a secured creditor is allowed to receive a dividend only upon the balance remaining unpaid after exhausting his security. *Wurtz* v. *Hart* 13 *Iowa*, 515; *National Union Bank* v. *National Mechanics Bank*, 30 A. R. 913 (M); *Merchants Bank* v. *Eastern Railway Company*, 124 M 518. The prevailing view, however, is in accord with the principle case. *Allen* v. *Danielson*, 15 R. I. 481: *West* v. *Bank of Rutland*, 19 V 403: *Paddock* v *Bates*, 19 I. S. 470; *Moses* v. *Ranlet*, 2 N. H. 488; *Graeff's Appeal*, 78 P. P. St. 146; *Kellock's case*, L. R. 3 Ch. App. 769. These latter cases, it is submitted, are correct, resting on the theory that the security is something collateral and does not reduce the debt, but only secures the creditor *pro tanto* in case the debtor cannot pay.—*Harvard Law Review.*

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Equity—Statute of Limitations—Mistake.—The plaintiff in this claims under a will which was discovered twenty years after the testator's property had been distributed among his next of kin. *Held*, that the action was not barred, since there was mutual and blamelessmistake. *Crawford's A'dmr.* v. *Smith's Ex'r*, 23 S. E. Rep 235 (V.)

In this country the statute of limitations operates as a bar in equity as well as law, *ex sao vigore.* But where through fraud or mistake it would be inequitable to permit it to bar the suit, Courts of Equity interpose, as in England. Fraud and mistake come within the same rule. *Brooks Bank et al* v. *Smith*, 2 Younge and Cook 58; *Hough* v. *Richrdson* S. 659; 2 Story, 659; Story's Equity Jurisprudence § 1521 A.—*Harvard Law Review.*

Evidence—Insanity.—Defendant was indicted for burglary; plea insanity. *Held*, that evidence by the prisoner's mother that she had another son, an imbecile from birth, should be admitted. *Schaeffer* v. *State*, 32 S. W. Rep. 679 (Ark).

The court cites *People* v. *Garbutt*, 17 Mich 9, as directly in point, and the decision follows the weight of authority in this connexion. Such evidence of a family trait is cumulative, and is only admissible in connection with and in support of other evidence tending to a direct proof of the same fact. This the court recognized in the present case. See *Snow* v. *Benton*, 28 J. 306; *People* v. *Smith*, 31 C 466; and Whaton and Stike's Medical Jurisprudence, Ss. 375, 377—*Harvard Law Review.*